



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**LAND AND ENVIRONMENT CASE NO. 3 OF 2015**

**TWO THIRDS INVESTMENT LIMITED & OTHERS .....PLAINTIFFS/APPLICANTS**

**VERSUS**

**KATANA SAID KALAMA & 3 OTHERS..... DEFENDANTS/RESPONDENTS**

**RULING**

1. The application dated 20th January, 2015 is brought under the provisions of order 40 rule 1, 2 and 3 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act. The applicants sought the following orders;

**1) Spent**

**2) Spent**

**3) That this honourable court be pleased to restrain the Defendants/Respondents from encroaching, trespassing, constructing, fencing, cultivating, grazing, obstructing the Applicants' right of ingress and/or egress into and/or out of all that parcel known as Plot Nos. Mn/II/6212, 6213, 6214, 6215, 6216, 6217, 6218, 6219, 6220, 6221, 6222, 6223, 6224, 6225, 6226, 6227, 6228, 6229, 6230, 6231, 6232, 6233, 6234, 6235, 6236, 6237, 6238, 6239, 6240, 6241, 6242, 6243, 6244, 6245, 6246, 6247, 6248, 6249, 6250, 6251, 6252, 6253, 6254, 6255, 6256, 6257, 6258, 6259, 6260, 6261, 6262, 6263, 6264, 6265, 6266, 6267, 6268, 6269, 6270, 6271, 6272, 6273, 6274, 6275, 6276, 6277, 6278, 6279, 6280, 6281, 6282, 6283, 6284, 6285, 6286, 6287, 6288, 6289, 6290, 6291, 6292, 6293, 6294, 6295, 6296, 6297, 6298, 6299, 6300, 6301, 6302, 6303, 6304, 6305, 6306, 6307, 6308, 6309, 6310, 6311, 6312, 6313, 6314, 6315, 6316, 6317, 6318, 6319, 6320, 6321, 6322, 6323, 6324, 6325, 6326, 6327, 6328, 6329, 6330, 6331, 6332, 6333, 6434, 6335, 6336, 6337, 6338, 6339, 6340, 6341, 6342, 6343, 6345, 6346, 6347, 6348, 6349, 6350, 6351, 6352, 6353, 6354, 6355, 6356, 6357, 6358, 6359, 6360, 6361, 6362, 6363, 6364, 6365, 63366, 6367, 6368, and 6369 (Original cr. No. 1222, MN/II/390 pending the hearing and final determination of this suit.**

**4) The Defendants be condemned to pay costs of the Application.**

2. The application is supported by the affidavit on the face of it and opposed by all the three respondents vide their replying affidavits filed.

3. During the pendency of this application, parties agreed to have a survey of the land occupied by the Defendants carried out. The survey was done and a survey report filed in court on 1st July, 2015. The report identified the 1st defendant occupied portions of plot No. 6239 and 6240. The 2<sup>nd</sup> Defendant occupied portions of plots Nos. 6263, 6264, 6270, 6269, 6268, 6262, 6314, 6315, 6273 and 6285

measuring 0.20 acres. The 3<sup>rd</sup> plaintiff occupies MN./11/6298, 6299, 6300, 6303, 6332, 6333, 6334, 6320 and 6335. The 4<sup>th</sup> Defendant occupies portions of plots Nos. MN/11/6245, 6246, 6253, 6247, 6248, 6255, 6256, 6272 and 6273. This report also confirmed all the defendants had structures on those portions of the land.

4. The defendants occupies a total of 30 plots. The injunction is sought in respect of over 150 plots. The applicants deposed that they surrendered plot Nos. 6329, 6331 and 6355 to the County Government and the respondents following consultative meetings. The applicants deposed further that they dispatched a contractor to do a wall on the plots but were chased by the respondents. That subsequently the respondents began putting up structures with a view to dispossessing the applicants of the land.

5. The 1st respondent deposed that he was born and brought up in the land now being claimed by the applicants. He deposed that on 24/3/1996 a meeting was held between the applicants and the settlers on this land whereby the 1st applicant was to offer land to squatters who had settled there. He annexed minutes of the meeting held on 28/5/2000 indicating portions of land donated and thus denied being a trespasser. He says he has lived and cultivated on the portions he occupies.

6. The 1st defendant deposed that he had sued the 1st applicant in 2014 vide HCC No. 232 of 2014 claiming adverse possession and annexed court documents. It is his case that the applicants have no prima facie case with probability of succeeding. He therefore opposed the grant of the orders sought.

7. The 2nd defendant and on behalf of 3<sup>rd</sup> and 4<sup>th</sup> defendants deposed similar sentiments stating that he moved to the suit land in 1966 and established residence on it in 1975. He cultivates the land together with his family. He also stated that the applicants claim is time barred by the provisions of section 7 of Cap 22 and urged the court to dismiss the plaintiff's application.

8. In submissions, the applicants agreed that the interest of justice would not be served if a litigant in possession is dispossessed at an inter locutory stage of proceedings. Therefore the applicants stated they are not praying for injunction to cover the parcels the respondents are occupying as itemized in the report i.e 6239 — but prayed for orders in respect of the remainder of the plots.

9. Taking into account the pleadings filed, the survey report and the submissions of the applicants; I am satisfied that indeed the applicants have shown documents of ownership of the suit plots. The Respondents defence is based on a claim of adverse possession which relates to the portions of land they occupy and cultivate. The applicant's supplementary affidavit annexed a letter showing there is an on-going sand harvesting which may lead to wastage of the whole land.

10. It is therefore necessary to preserve the land to avoid wastage. Consequently I do grant orders of injunction in terms of prayer 3 which orders shall not apply to suit plots Nos. 6239, 6240, 6245, 6246, 6247, 6248, 6253, 6255, 6256, 6272, 6303, 6332, 6233, 6234, 6263, 6320, 6264, 6270, 6269, 6273 and 6285. Costs of the application to abide the outcome of the suit.

**DELIVERED, DATED and SIGNED at MOMBASA on this 6th day of July, 2016.**

**A. OMOLLO**

**JUDGE**

**In the presence of:**

Ms. Sibiru for 1st Respondent

No appearance for Applicant

Court Assistant Jescah